

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-
NO-4033

Original

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HUDSON TRANSIT LINES, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, RESPONDENTS

ON PETITION TO REVIEW AN ORDER
OF THE INTERSTATE COMMERCE COMMISSION

JOINT BRIEF OF THE INTERSTATE COMMERCE
COMMISSION AND THE UNITED STATES

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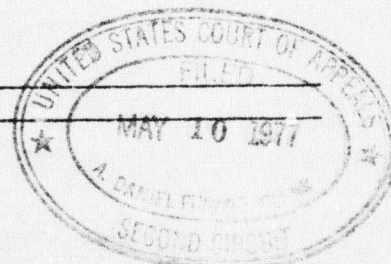


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ON PETITION TO REVIEW AN ORDER
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JOINT BRIEF FOR THE INTERSTATE
COMMERCE COMMISSION AND THE UNITED STATES

ISSUE PRESENTED

Whether the Interstate Commerce Commission's order granting motor common carrier authority is within the scope of the Commission's statutory authority and is based upon adequate findings.

STATUTES AND REGULATIONS INVOLVED

Section 203(a)(14) of the Interstate Commerce Act,
49 U.S.C. 303(a)(14), provides:

The term "common carrier" by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except

transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), provides:

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers of property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

STATEMENT OF THE CASE

This is a petition to set aside an order of the Interstate Commerce Commission granting Monsey Transportation Corp. motor common carrier authority to transport passengers and their baggage, over irregular routes, in special and charter operations, beginning and ending at Monsey, New York and extending to points in New York and Kings County, New York.

STATEMENT OF THE FACTS

In an application filed July 3, 1975, Monsey Transportation Corp. requested a permit to operate as a contract carrier, by motor vehicle, over regular routes, transporting passengers and their baggage, in special and charter operations, "with Chassidic Jews and religious groups, organizations, congregations and synagogues of the Chassidic Jewish sect" from Monsey, New York to New York and Kings County, New York and return (Pet.'s App. pp. 11-21).

Three common carriers, including Hudson Transic, Inc. ("Hudson"), filed protests to the application, and an oral hearing was held before an Administrative Law Judge on April 20, 1976. Prior to the taking of testimony at the hearing, protestants withdrew their objections to the application pursuant to a stipulation between protestants and applicant whereby the application was amended to read as follows:

Authority is sought to operate as a contract carrier by motor vehicle, over irregular routes, transporting passengers and their baggage . . . between that area in Monsey, New York [designated area] and [designated streets] Manhattan, New York and . . . [designated streets] Brooklyn, New York under continuing contracts with Jewish Orthodox congregations and Yeshivas located in the described Monsey area; with transportation restricted to members of said congregations and Yeshivas. [Pet.'s App. pp. 106-07.]

At the hearing, applicant and several residents of Monsey testified regarding the necessity for applicant's bus service. No testimony was presented against the application.

The testimony established that Monsey, New York (located in Rockland County approximately twenty-two miles from New York City) is an unincorporated hamlet established approximately twenty years ago by Orthodox Jews formerly from Bronx and Kings County, New York (Pet.'s App. pp. 112-13, 121). Some 2500 Orthodox Jewish families live in Monsey and constitute the bulk of its population. (Pet.'s App. pp. 113, 116-17, 121, 126). The employment skills of the Orthodox Jewish community are generally restricted to the "needles and trades" industries and small peddling firms located in New York City (Pet.'s App. p. 122). Consequently, most of the working population of Monsey must commute daily to New York City to obtain employment (Pet.'s App. pp. 113, 121-23, 139).

No existing bus line directly serves the Monsey community, and the majority of the residents of Monsey do not own a car (Pet.'s App. pp. 113, 123). Without direct bus service, the residents of Monsey resort to car pools and small buses run by the various prayer congregations in Monsey to commute daily to work (Pet.'s App. pp. 113-14, 123, 127-28, 130-31). Such methods of communication are time-consuming, troublesome, and costly (Pet.'s App. pp. 122-23, 127, 131-36, 138-39).

Pursuant to its application, Monsey Transportation Corp. proposed to meet the transportation needs of the Orthodox Jewish community by providing daily, round-trip bus service from Monsey to New York City through contractual arrangements with the approximately 32 congregations (prayer groups) and various religious schools established in Monsey. (Pet.'s App. pp. 113-14, 117-18, 125). ^{1/} Applicant would board passengers at designated points in Monsey and would carry them directly to their points of employment in New York City. Return trips on Friday would be made earlier than other days of the week to enable passengers to return home prior to sundown in accordance with their religious needs (Pet.'s App. p. 119). Applicant would respect the religious customs of the Orthodox Jewish community, e.g., the desire of its members to segregate themselves by sex on the bus (Pet.'s App. pp. 115-16, 124-25). Such passengers would be free to pray or study in transit and certain seats would be set aside for such activity (Pet.'s App. p. 116).

The Administrative Law Judge, in an initial decision dated April 30, 1976, found that applicant would provide "a much needed service" and recommended that Monsey's appli-

^{1/} A congregation consists of a minimum of 10 males; the average congregation in Monsey has 40-50 members (Pet.'s App. pp. 118, 125-126).

cation for a contract carrier permit be granted (Pet.'s App. pp. 8-10). ^{2/} No exceptions were filed to the initial decision. The Commission's Review Board No. 2, however, stayed the recommended order on its own initiative pending further order of the Commission (Pet.'s App. p. 7). In an order dated July 20, 1976, Review Board No. 2 found as follows:

That the Administrative Law Judge's recommended grant of motor contract carrier authority to transport passengers between a described area in New York under a continuing contract or contracts with an unlimited number of unnamed "Jewish Orthodox congregations or yeshivas" located in the named origin territory should be modified; that testimony adduced at hearing indicated that there exist more than 32 of the described congregations in the Monsey, N.Y., area as well as an undetermined number of yeshivas or religious schools; that if applicant were to enter into contracts for transportation services with each of these organizations and performed operations thereunder, it could not be considered as engaging in transportation for a "limited number of persons" as specified in the contract carrier definition of section 203(a)(15) of the Interstate Commerce Act; that the operations proposed by applicant and shown to be required by the supporting wit-

^{2/} The Administrative Law Judge noted in his decision that because "the number of contracting organizations could reach a substantial figure" it could "suggest to some . . . that the operation had lost its character as a contract carriage operation." The Judge found, however, in light of "the authority that will be granted and the nature of the operation to be conducted, that as long as the limitations in the permit are observed, the operation will necessarily retain the character of contract carriage and will be wholly irreconcilable with common carriage" (Pet.'s App. p. 9). The Judge also made reference to Umthun Trucking Co. Ext. - Phosphates - Feed Supplements, 91 M.C.C. 691, 696-697, wherein a "limited class" concept was discussed. See infra, pp. 22-26.

nesses may be described more appropriately in terms of motor common carrier special and charter operations; that the record amply shows the latter service to be required by the public convenience and necessity; and that said authority will be granted in lieu of the contract carriage recommended by the Administrative Law Judge. [Pet.'s App. p. 5]

The Review Board also considered that the territorial description used by the Administrative Law Judge was "administratively infeasible and unduly restrictive" and modified Monsey's territorial grant of authority to include all points in Monsey, New York and all points in New York and Kings County, New York (Pet.'s App. p. 5). The Review Board withheld the issuance of a certificate to applicant for thirty days to enable parties in interest to intervene.

Thereafter, Hudson and Rockland Coaches, Inc., two of the original protestants, filed petitions for reconsideration of the Review Board's order. The National Bus Traffic Association (NBTA) also filed a petition for leave to intervene and for leave to file a tendered petition for reconsideration or further hearing. By order dated December 13, 1976, the Commission, Division I, acting as an Appellate Division, denied the petitions for reconsideration and leave to intervene (Pet.'s App. p. 3). The Commission Division I, subsequently denied a petition by Hudson for a finding of an issue of general transportation importance and a petition by NBTA for reconsideration of its order denying NBTA leave to intervene (Pet.'s App. pp. 1-2). On March 15, 1977, Monsey was issued a certificate of public convenience and necessity. No stay of the Commission's order was sought.

Summary of Argument

The Orthodox Jewish Community of Monsey, New York is a substantial community (approximately 2500 families) constituting almost the entire population of the unincorporated hamlet. The record before the Commission demonstrated the need of the Orthodox Jewish community of Monsey for specialized daily commuter service to New York City. The record further established that service provided by existing carriers to such community were inadequate. Where, as in the instant case, a specific segment of the population with distinct transportation needs is not being adequately served by existing carriers, the Commission may properly grant common carrier authority to a motor carrier proposing to meet those needs. National Bus Traffic Association v. United States, 284 F. Supp. 270 (N.D. Ill. 1967), affirmed, 391 U.S. 468 (1968). The Commission's grant of authority in the instant case imposed a statutory duty upon applicant to serve all members of the public without discrimination, and such grant of authority by the Commission fully complied with the statutory requirements pertaining to common carriage set forth in the Interstate Commerce Act.

The Commission's conclusion that applicant's proposed operation did not satisfy the requirements of contract carriage was a proper exercise of the Commission's discretion and was fully justified by the nature and scope of the service proposed, which contemplated the furnishing of transportation services to more than the "limited number of persons" provided for in the definition of contract carriage set forth in the Act.

ARGUMENT

THE COMMISSION PROPERLY
EXERCISED ITS DISCRETION
IN GRANTING APPLICANT A
CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY
AUTHORIZING IT TO OPERATE
AS A COMMON CARRIER

Section 206(a)(1) of the Interstate Commerce Act provides that "no common carrier by motor vehicle . . . shall engage in any interstate . . . operation on any public highway . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations"

49 U.S.C. §306(a)(1). The Commission must grant such a certificate if it finds that the applicant is "fit, willing, and able" and "that the proposed service . . . is or will be required by the present or future public convenience and necessity" 49 U.S.C. §307.

In enacting the Interstate Commerce Act, Congress established the Commission as the guardian of the public interest in determining whether certificates of public convenience and necessity should be granted. ICC v. Parker, 326 U.S. 60, 65 (1945); United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236, 241 (1945); Eazor Express, Inc. v. United States, 218 F. Supp. 393, 395 (W.D. Penna. 1963).

It also granted the Commission a "wide range of discretionary authority" in applying its expert judgment to determine whether the public interest warrants certification of any particular proposed service. Schaffer Trans. Co. v. United States, 355 U.S. 83, 88 (1957); United States v. Detroit & Cleveland Navigation Co., supra, at 241. Consequently, the role of a reviewing court, in passing upon the grant or denial of a certificate by the Commission, is a narrow one. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284-85 (1974); United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 536 (1946). The court is "not empowered to substitute its judgment for that of the agency." Bowman Transportation, Inc. v. Arkansas-Best System, Inc., supra, at 285; United States v. Pierce Auto Freight Lines, Inc., supra, at 536; Burlington Truck Lines v. United States, 371 U.S. 156, 169 (1962). The function of the reviewing court is "limited to ascertaining whether there is warrant in the law and fact for what the Commission has done." United States v. Pierce Auto Freight Lines, Inc., supra, at 536. The order of the Commission is not to be disturbed by the court if the order is within the scope of the Commission's statutory authority and is based upon adequate findings which are supported by substantial evidence in the record. United States v. Pierce Auto Freight Lines, Inc., supra, at 536;

Illinois Central Railroad Co. v. Norfolk & Western Railway Co., 385 U.S. 57, 66 (1966); Willey v. United States, 245 F. Supp. 669, 674 (E.D. Ill. 1965); Hudson Transit Lines, Inc. v. United States, 314 F. Supp. 197, 200 (D.N.J. 1970).

In the instant case, the Commission properly exercised its administrative discretion.

A. The Grant of Authority is within the Commission's Statutory Power.

A "common carrier" is defined in the Interstate Commerce Act as "any person which holds itself out to the general public to engage in the transportation by motor vehicle . . . of passengers or property or any class or classes thereof for compensation" 49 U.S.C. 303(a)(14). Petitioner claims that because applicant's request for motor carrier authority was based upon the specialized needs of a "limited segment" of population and not that of the "general public," the Commission exceeded its statutory powers in granting applicant common carrier authority (Pet.'s Brief, pp. 29-31). Petitioner's claim is without merit.

The term "general public" as used in the Interstate Commerce Act is necessarily a relative one. No carrier serves all the public. Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 255 (1916). A carrier's customers are limited by "place, requirements, ability to pay and other facts." Terminal Taxicab Co. v. Kutz, supra, at 255. Where the facts of a

particular case indicate that a specific segment of the population with distinct transportation needs is not being adequately served by existing carriers, the Commission may properly grant common carrier authority to a motor carrier proposing to meet those special needs. Louis Rosenbaum Common Carrier Application, 105 M.C.C. 133 (1966), affirmed sub nom. National Bus Traffic Association v. United States, 284 F. Supp. 270 (N.D. Ill. 1967), affirmed, 391 U.S. 468 (1968) (limousine service geared to Spanish-speaking persons); Prue Common Carrier Application, 31 M.C.C. 789 (1942) (commuter transportation service for mill workers); Charles D. Jordan Common Carrier Application, 51 M.C.C. 388 (1950) (commuter service for employees of naval base); Myers Common Carrier Application, 89 M.C.C. 125 (1962) (transportation of stockmen to and from stockyards); see also Elegante Tours, Inc. - Broker Application, 113 M.C.C. 156, 160 (1971); Shippers Truck Service, Inc. Extension - 19 States, 125 M.C.C. 323 (1976); O-J Transport Company Common Carrier Application, 120 M.C.C. 699, 705 (1974), affirmed sub nom. O-J Transport Co. v. United States, 536 F.2d 126 (CA6 1976). In such case, the grant of authority "does not evince a discriminatory grant but is, instead, a grant to provide a needed service" to the public. Elegante Tours, Inc. - Broker Application, supra, at 160;

O-J Transport Company v. United States, 536 F. 2d 126, 131-132 (CA6 1976).

In the instant case, the record established a distinct and specialized need of the Orthodox Jewish community of Monsey, New York for daily commuter service to and from New York City, which transportation need was not adequately being served by existing carriers. The record further established that such community constituted almost the entire population of Monsey, New York. In light of such demonstrated transportation need on behalf of a specific segment of the public, the Commission was properly within its statutory authority in granting applicant a certificate of public convenience and necessity to serve the community. National Bus Traffic Association v. United States, *supra*; O-J Transport Company v. United States, *supra*.

Petitioner argues that based on the Commission's decision in the instant case, common carrier authority would be granted in any case where a religious group requests specialized service; e.g., where congregations of a given faith support a contract carrier application for service between New York and Philadelphia (Pet.'s Brief at 30-31).

Petitioner's analogy, however, does not withstand analysis, essentially for the reasons stated by the court in the National Bus Traffic case, supra. In that case, the court, in approving the Commission's grant of common carrier authority to a carrier proposing limousine service tailored to the specialized needs of the Spanish-speaking community, held (284 F. Supp. at 272):

Each case must . . . stand on its own facts. Service between El Paso, situated on the Mexican border . . . and Los Angeles, is a substantially different question than service between New York and Pittsburgh. We hold only that the Commission's action here was within its statutory power.

Petitioner further contends that because applicant's request for motor carrier authority was premised upon its intention to serve only the specialized needs of the Orthodox Jewish community in Monsey and not the "general public," applicant fails to satisfy the statutory definition of common carrier and that the Commission therefore exceeded its authority in granting the certificate (Pet.'s Brief, pp. 20a-29).

Every common carrier has "a duty to serve equally and fairly all those who request [its] service, subject . . . to the limitations of each carrier's authority and ability." Restrictions on Service By Motor Common Carriers, 111 M.C.C. 151, 163 (1970); Greyhound Lines, Inc. v. The Gray Line Scenic Tours, Inc., 121 M.C.C. 242, 261-62; Pan-American Bus Lines Operation, 1 M.C.C. 190, 205-06 (1936); ICC v. Law Motor Freight Inc., 318 F. Supp. 506 (N.H. 1970). In recognition of that

obligation the Commission, in cases where only a need for specialized service to a particular segment of population has been shown, has declined to restrict an applicant's certificate to serve only that specialized group. Rather, it has imposed the statutory obligation, consistent with the carrier's status as a common carrier, to serve equally all those who may request to use its service. Kickert Common Carrier Application, 51 M.C.C. 1 (1949); Charles D. Jordan Common Carrier Application, supra; Shores and Brown Common Carrier Application, 26 M.C.C. 243 (1940); see also Louis Rosenberg Common Carrier Application, supra; Prue Common Carrier Application, supra.

Such was the action of the Commission in the instant case. In framing its order, the Commission rejected the contract carrier restrictions contained in the authority recommended by the Administrative Law Judge -- which limited applicant's service to members of congregations and yeshivas in Monsey -- and instead authorized general service to the public as follows:

Operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of passengers and their baggage . . . , in special and charter operations, beginning and ending in Monsey, N.Y., and extending to points in New York and Kings Counties, N.Y. [Pet.'s App. p. 6.]

The Commission also specifically stated in its order that "no preferential treatment based on religious or ethnic factors is conferred or intended by our grant of authority herein." The authority conferred by the Commission thus properly established applicant's obligations to the public as a common carrier in accord with its status.

Since the only segment of population presently requesting applicant's services are members of the Orthodox Jewish community of Monsey who supported the application, it is wholly speculative whether other members of the public will seek to use applicant's services and whether, in that event, future actions of applicant would give rise to an issue of discriminatory treatment. Whether future conduct of a carrier may be violative of its certificate is a matter properly left for determination by the Commission on a case-by-case basis pursuant to the complaint procedure established by section 216(e) of the Act 49 U.S.C. §316(e). Cf. Auclair Transportation, Inc. v. United States, 221 F. Supp. 328 (D. Mass. 1963), affirmed, 376 U.S. 514 (1966). The Commission, on its own motion or as a result of a complaint initiated under section 216(e), has full authority to take such measures as may be necessary to enforce applicant's duties to the public.

See 49 U.S.C. 212, 216(e). ^{3/}

Petitioner additionally contends that because applicant's service would permit separate seating by sex and that members of the Orthodox Jewish community would be free to engage in prayer and study while being transported, such service would constitute "unlawful" sex discrimination and would be "discriminatory, prejudicial, and disadvantageous for other members of the general public to be subjected to such practices in transit" in violation of section 216(d) of the Interstate Commerce Act.^{4/} (Pet.'s Brief, pp. 31-34).

The record clearly establishes that such separate seating referred to by petitioner would be undertaken on an entirely voluntary basis by the members of the Orthodox Jewish

^{3/} The authority conferred upon applicant was that of a common carrier engaged in "special and charter operations." Charter operations involve a collective contract for the exclusive use of a vehicle by a particular pre-formed group. Arrow Stage Lines, Inc., 96 M.C.C. 572, 578 (1964); Passenger Transportation in Special Operations, 112 M.C.C. 160, 187. Special operations is a "catch all" category involving the sale of tickets to individual passengers. Arrow Stage Lines, Inc., supra, at 578; Passenger Transportation in Special Operations, supra, at 187. Pursuant to its authority, applicant may therefore either contract with pre-formed groups (e.g., congregations, yeshivas, or other organizations) or may sell tickets on an individual basis to those in Monsey desiring its round-trip commuter services. Thus, the type of authority granted applicant is sufficiently flexible as to enable applicant to carry on its proposed specialized service to the Orthodox Jewish community while also making its facilities available to other members of the public who may request to use its service.

^{4/} Section 216(d) provides in pertinent part:

. . . It shall be unlawful for any common carrier . . . to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever

community in accordance with their religious customs and that such seating restrictions would not be imposed by applicant. Such voluntary seating practices by individual passengers do not constitute unlawful conduct of a carrier in violation of section 216(d). See Discrimination Operations of Interstate Motor Carriers of Passengers, 86 M.C.C. 743, 753 (1961); Compare State of Georgia v. United States, 201 F. Supp. 813, 815 (N.D. Ga. 1961), affirmed 371 U.S. 9 (1962). The fact that members of the Orthodox Jewish community may engage in prayer or study while in transit clearly does not constitute any "discriminatory" action on the part of applicant, and any "prejudice" this may have on members of the general public is wholly speculative. ^{5/}

^{5/} Petitioner in its brief makes repeated reference to applicant's operation as "a synagogue on wheels" (Pet.'s Brief, pp. 28, 44). The term does not appear in the record, nor is there any testimony that religious services would be conducted in transit.

B. The Commission's Conclusion That Applicant's Proposed Operation Did Not Satisfy the Requirements of Contract Carriage Was a Rational Exercise of the Commission's Discretionary Authority.

A "contract carrier" is defined by section 203(a)(15) of the Interstate Commerce Act as "any person which engages in transportation by motor vehicle of passengers or property . . . for compensation . . . under continuing contracts with one person or a limited number of persons" 49 U.S.C. 303(a)(15).

Prior to the enactment of present section 203(a)(15) by Congress in 1957, the Commission had no authority to limit the number of shippers that a contract carrier could serve. See United States v. Contract Steel Carriers, Inc., 350 U.S. 409 (1956); Umthun Trucking Co. - Extension - Phosphate Feed Supplements, 91 M.C.C. 691, 693-94 (1962). Contract carriers could therefore negotiate contracts with an unlimited number of shippers and thus, in effect, hold themselves out to the general public in violation of the Act's intent to distinguish between a contract carrier and a common carrier. Umthun Trucking Co. - Extension - Phosphate Feed Supplements, *supra*, at 693-94. The Congressional purpose in enacting the 1957 amendment, which was proposed by the Commission, was to remedy this situation by providing the Commission with authority to set an effective limit to the number of shippers which could be served by a contract carrier. Umthun Trucking Co. - Extension - Phosphate Feed Supplements, *supra*, at 694. As adopted, section 203(a)(15) does not specify what shall con-

stitute a "limited number of persons." The legislative history of that section clearly indicates that the statutory intent was to give the Commission broad discretion, under the facts of each case and in light of the "overall operations" of an applicant, to determine whether a carrier proposes to supply transportation services for "a limited number of persons." P. Saldutti & Sons, Inc. v. United States, 210 F. Supp. 307, 311 (D.N.J. 1962); C-Line, Inc. v. United States, 376 F. Supp. 1043, 1049 (R.I. 1974); Keller Trucking, Inc. Extension - United States, 121 M.C.C. 42, 49 (1975); Frontier Delivery, Inc. v. Tioga Transport, Inc., 82 M.C.C. 536, 539-540 (1960). As an exercise of administrative discretion, if the Commission's decision is rational and is supported by substantial evidence in the record, its findings may not be disturbed. Illinois Central Railroad Co. v. Norfolk & Western Railway Co., 385 U.S. 57, 69 (1966); United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 535-36 (1946); C-Line, Inc. v. United States, *supra*, at 1049; Hudson Transit Lines, Inc. v. United States, 314 F. Supp. 197, 200 (D.N.J. 1970); National Bus Traffic Association v. United States, 284 F. Supp. 270, 272 (N.D. Ill. 1967).

As presented to the Commission, Monsey's amended application sought authority to operate as a contract carrier providing round-trip commuter service between Monsey, New York and points in New York City pursuant to "continuing contracts

with Jewish Orthodox congregations and Yeshivas located in the described Monsey area " (Pet.'s App. p. 106). The record before the Commission disclosed that the proposed contracting organizations consisted of approximately 32 existing congregations and an unspecified number of yeshivas or religious schools and that new congregations were continually being formed in Monsey as a result of increases in population of the Orthodox Jewish community (Pet.'s App. p. 126). The record further disclosed that the Orthodox Jewish community in Monsey is presently composed of approximately 2500 families and that the community constituted almost the entire population of the unincorporated hamlet. The Commission, in assessing such facts, concluded as follows regarding the nature of applicant's proposed operation:

That the Administrative Law Judge's recommended grant of motor contract carrier authority to transport passengers between a described area in New York under a continuing contract or contracts with an unlimited number of named "Jewish Orthodox congregations or yeshivas" located in the named origin territory should be modified; that testimony adduced at hearing indicated that there exist more than 32 of the described congregations in the Monsey, N.Y. area as well as an undetermined number of yeshivas or religious schools; that if applicant were to enter into contracts for transportation services with each of these organizations and performed operations thereunder, it could not be considered as engaging in transportation for a "limited number of persons" as specified in the contract carrier definition of section 203(a)(15) of the Interstate Commerce Act; that the operations proposed by applicant and shown to be required

by the supporting witnesses may be described more appropriately in terms of motor common carrier special and charter operations; that the record amply shows the latter service to be required by the public convenience and necessity; and that said authority will be granted in lieu of the contract carriage recommended by the Administrative Law Judge. [Pet.'s App. p. 5]

In light of the number of contracting organizations involved, which were essentially unlimited, and the scope and nature of applicant's proposed operation, which was designed to provide a specialized commuter service to a substantial segment of population not being served adequately by existing carriers, the Commission properly and rationally exercised its discretion in construing applicant's proposed service as common carriage and not contract carriage. See, e.g., Louis Rosenbaum Common Carrier Application, 105 M.C.C. 133 (1966), affirmed sub. nom. National Bus Traffic Association v. United States, *supra*; Elegante Tours, Inc. - Broker Application, 113 M.C.C. 156, 170 (1971); Charles D. Jordan Common Carrier Application, 51 M.C.C. 388 (1950); see also Umthun Trucking Co. - Extension - Phosphate Feed Supplements, *supra* (Commission will generally consider that more than 6-8 contracts with shippers will constitute common carriage); Suburban Transit Corp. - Contract Carrier Application, 106 M.C.C. 763, 772-773 (1968) (commuter service for community with projected population of 50,000 would be tantamount to common carriage).

Petitioner contends that the Commission, pursuant to its findings in other proceedings permitting a contract carrier to serve a "limited class" of shippers, was compelled to find contract carriage in the instant case (Petitioner's Brief, pp. 34-35). Petitioner's claim is without merit.

The concept of a "limited class" of shippers was first articulated by the Commission in Armored Motor Service Co., Inc. Conversion Proceeding, 77 M.C.C. 433 (1958). In that case the Commission was called upon to consider whether respondent armored-car carriers, which provided specialized protective services for from seven to 314 contracting shippers, could be held to be providing services to a "limited number of persons" within the amended statutory definition of "contract carrier." The Commission, in exercising its discretionary authority to determine what shall constitute a "limited number of persons" under section 203(a)(15), found that "the unusual and highly specialized service purveyed by respondents is actually confined to a limited class of customers so that respondents properly can be considered as serving a 'limited number of persons' . . . as set forth in the act." Armored Motor Service Co., Inc., Conversion Proceeding, supra, at 439. The Commission, however, specifically noted in its decision that:

[I]n determining whether the operations of a motor carrier conform to the amended definition of a contract carrier by motor vehicle, we shall be guided solely by the facts peculiar to the particular carrier's operations as they relate to the matter of determining its status, and that our determination herein in no way shall be considered binding in proceedings where the facts and circumstances differ materially from those disclosed herein. [Armored Motor Service Co., Inc., Conversion Proceeding, supra, at 439.]

The "limited class" concept enunciated by the Commission in the Armored Motor case, supra, was subsequently applied by the Commission on a case-by-case basis in other proceedings where the peculiar facts and circumstances before it warranted such application. See, e.g., as cited by petitioner, Lane & Caplan, Extension - New Jersey, 78 M.C.C. 547 (specialized motion picture film delivery service serving 119 contracting theater operations); Howell Trucking Co. - Extension - Secaucus, 86 M.C.C. 643 (specialized frozen food delivery service serving over 15 contracting retail stores); S. Klein Trucking Corp. Contract Carrier Application, 89 M.C.C. 53 (1962) (specialized merchandise delivery service for 72 subsidiaries and 40 concessionaires of department store); Michigan Pickle Co. - Common Carrier Application - Passengers, 77 M.C.C. 549 (1958) (Commission found transportation of migratory workers constitutes "limited class" contract carriage pursuant to specific statutory intent expressed in section 203(a)(22) of the Act); Pan American Motor Coaches - Extension - Migrant Workers, 99 M.C.C. 117 (1965) (migratory workers); Del-Val Coach, Inc., Contract Carrier Application, 119 M.C.C. 570 (1974) (specialized commuter service serving tenants of four apartment buildings).

In urging that the Commission was compelled by its previous decisions to find contract carriage in the instant case, petitioner places particular reliance on the Del-Val case, supra, and asserts that the instant proceeding is "no different"

from Del-Val (Petitioner's Brief, p. 44). The facts in Del-Val, however, are substantially different from the instant proceeding.

In Del-Val, the applicant proposed to provide commuter service to Philadelphia, Pa. for the tenants of four apartment buildings located in Collingswood, N.J. pursuant to contracts negotiated with the owners of such buildings. Thus, in Del-Val, unlike the instant case, not only were there a limited and specified number of contracting organizations (4), but also the number of persons to be served by applicant was limited and did not constitute a comparable community of population.^{6/} Indeed, in Del-Val the Commission's Review Board arguably could have found contract carriage even without application of the "limited class" concept. Thus, the peculiar facts and circumstances in the instant case differ materially from that in Del-Val, supra, and the Commission was well within its discretionary authority in reaching a different conclusion as to the nature of the proposed operation. Armored Motor Service Co. Inc., Conversion Proceeding, supra, at 439.

Moreover, it is clear that in the instant case the Commission necessarily considered and rejected as inappropriate the application of the "limited class" concept referred to by

^{6/} The testimony in Del-Val indicated that, in the one apartment building discussed, approximately 300 tenants utilized applicant's service. Del-Val Coach, Inc., Contract Carrier Application, supra at 572.

petitioner. That concept was one of the premises upon which the Administrative Law Judge based his recommendation of contract carrier authority, and the concept was discussed in the referenced pages of the Umthun decision, supra, referred to by the Administrative Law Judge in his decision.^{7/} In modifying the Administrative Law Judge's recommendation, the Commission specifically assessed the nature and scope of the proposed service and concluded that the proposed service "may be described more appropriately in terms of motor common carrier special and charter operations" (Pet.'s App. p. 5).

At best, petitioner has attempted to prove that the Commission "was not compelled by its earlier holdings" to conclude that applicant's proposed operation did not constitute contract carriage. Chieppo Bus Co. v. United States, 383 F. Supp. 1192, 1197 (D. Conn. 1974). This is a far cry, however, from the proof of arbitrariness required before a court will overturn the Commission's considered judgment. Chieppo Bus Co. v. United States, supra, at 1197.

^{7/} See Umthun Trucking Co. - Extension - Phosphate Feed Supplements, supra, at 696-697.

C. The Commission's order is based upon adequate findings.

Petitioner contends that the Commission's order in the instant case is defective because it is not predicated on underlying findings regarding the adequacy of existing service and the competitive impact which the proposed service would have on the operations of existing carriers (Pet.'s Br., pp. 45-48). Petitioner's contention is without merit.

The Commission has generally looked to the following guidelines in making a determination whether a proposed service is warranted by public convenience and necessity:

(1) whether the new operation or service will serve a useful public purpose, responsive to public demand or need, (2) whether this purpose can and will be served as well by existing lines or carriers, and (3) whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. Pan American Bus Lines Operation, 1 M.C.C. 190 (1936). Such guidelines have been endorsed by the reviewing courts. See, e.g., Chem-Haulers, Inc. v. United States, 536 F.2d 610, 618 (5th Cir. 1976); Artus Trucking Company, Inc. v. Interstate Commerce Commission, 377 F. Supp. 1224, 1228 (E.D.N.Y. 1974); Engel Van Lines, Inc. v. United States, 374 F. Supp. 1217, 1221-1222 (D.N.J. 1974).

In the instant case, the Commission's underlying findings regarding public convenience and necessity were clearly expressed in its order and provided a rational basis for the conclusion reached.

The Commission specifically stated the reasons for its determination as follows:

[W]e feel constrained to emphasize that our authorization of the proposed service is based solely on applicant's willingness, and existing carriers' apparent inability or unwillingness, to respond to the specialized needs of that segment of the public represented by the supporting witnesses. That no preferential treatment based on religious or ethnic factors is conferred or intended by our grant of authority herein; and that the Commission has stated that where existing carriers are not providing an adequate service to any particular segments of the public, a grant of authority to cure this defect does not evince a discriminatory policy but is, instead, an award designed to provide a needed service, Cf. Elegante Tours, Inc. - Broker Application, 113 M.C.C. 156, 160 (1971). [Pet.'s App. p. 5a.]

In addition, the Commission stated the following as regards the findings of the Administrative Law Judge:

We further find, that the findings of the Administrative Law Judge should be, and they are hereby, modified to reflect the grant of authority described in the appendix hereto [common carrier in special and charter operations].

And we further find, That the statement of facts and findings of the Administrative Law Judge, as modified herein, should be, and they are hereby, affirmed and adopted as our own. [Pet.'s App. p. 5a.]

The Administrative Law Judge's adopted statement of facts adopted by the Commission in its order, found "that applicant will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the Orthodox Jewish community of Monsey;" that "[t]hese

people constitute nearly the entire population of Monsey, and they absolutely require a bus service to and from their places of employment in New York City;" "that [existing] carriers have declined to provide such a service;" and "that existing carriers would be unaffected by a grant of authority" (Pet.'s App. pp. 8-9).

The Commission's order is thus specifically predicated on findings that there is a public need for the service, that existing service is inadequate, and that the operation of existing carriers would be unaffected by the proposed special operations and charter service authorized. The fact that the Commission chose to incorporate by reference the findings and statement of facts of the Administrative Law Judge rather than restating them in its order is of no consequence. National Bus Traffic Association v. United States, 284 F. Supp. 270, 271 (M.D. Ill. 1967), affirmed, 391 U.S. 468 (1968); North American Van Lines v. United States, 217 F. Supp. 837, 842 (M.D. Ind. 1963). Indeed, even without incorporating the Administrative Law Judge's statement of findings by reference, such findings flowed directly from the Commission's express statement in its order that its grant of authority was based solely on the public need for the proposed service and that existing carriers were unable or unwilling to provide the specialized service proposed. Cf. Interstate Commerce Commission v. J-T Transport Co., 368 U.S. 81 (1961); Nationwide Carriers, Inc. v. United States, 380 F. Supp. 1132, 1136 (D. Minn. 1974).

Because the Commission's underlying reasons are clearly stated, provide a rational basis for the Commission's conclusion, and are supported by substantial evidence in the record, the order is a proper exercise of the discretionary authority vested in the Commission by Congress and it should be upheld. Cf. Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 285-86 (1974); Lemmon Transport Co. v. United States, 393 F. 2d 838, 841 (W.D. Va. 1975); Ross Express, Inc. v. United States, 529 F.2d 679, 682 (1st Cir. 1976); Southern Kansas Greyhound Lines, Inc. v. United States, 134 F. Supp. 502, 506 (W.D. Mo. 1955), affirmed, 351 U.S. 921 (1956); North American Van Lines v. United States, *supra*, at 842.

Moreover, the Commission's findings clearly reflect that it weighed the competing interests involved and determined that the public need for applicant's service outweighed any adverse effect on existing carriers. See O-J Transport Co. v. United States, 536 F. 2d 126, 130 (6th Cir. 1976); Southern Kansas Greyhound Lines, Inc. v. United States, *supra*, at 509. This is precisely the type of judgment that the Commission is equipped to make, and it requires no speculation on the part of a reviewing court to discern the reasoned basis for the Commission's conclusion. Cf. Bowman Transportation v. Arkansas-Best Freight System, *supra*, at 293; Lemmon Transportation Co. v. United States, *supra*, at 841; O-J Transport Co. v. United States, *supra*, at 130.

CONCLUSION

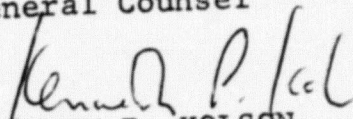
The order of the Interstate Commerce Commission
should be affirmed.

Respectfully submitted,

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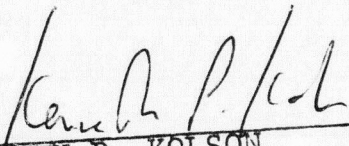
CERTIFICATE OF SERVICE

I hereby certify that on this, the 9th day of May, 1977, I have served true and accurate copies of the foregoing Joint Brief of the Interstate Commerce Commission and the United States on all parties of record by first class mail as follows:

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